

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

RICHARD ALLAN CASE,

Petitioner,

v.

MAGGIE MILLER-STOUT,

Respondent.

CASE NO. C12-187 MJP-MAT

ORDER ON REPORT AND  
RECOMMENDATION

The Court, having reviewed the Magistrate Judge's Report and Recommendation (Dkt. No. 26), Petitioner's Objection to Magistrate's Report and Recommendation (Dkt. No. 33) and all attached declarations and evidence, makes the following ruling:

IT IS ORDERED that the Report and Recommendation is ADOPTED, and Petitioner's request for a preliminary injunction preventing his transfer to another facility is DENIED.

IT IS FURTHER ORDERED that Petitioner's request for a phone number with which to communicate with the Court is DENIED.

## Discussion

Petitioner, an inmate incarcerated at the Airway Heights Corrections Center, seeks a preliminary injunction preventing his transfer to another Washington State facility. The request is improper and non-meritorious on a number of grounds.

First, Petitioner seeks to challenge the conditions under which he is being held (or speculates that he will be held), which is more properly brought pursuant to 42 U.S.C. § 1983. His pending habeas petition is designed solely to review the legality or duration of his confinement and is not the proper vehicle to contest a transfer between prisons. *See Pischke v. Litscher*, 178 F.3d 497, 499 (7th Cir. 1999)(habeas petition improper means to challenge transfer between prisons).

Second, even assuming for the sake of argument that Petitioner is entitled to injunctive relief in a pending habeas action, he has failed to satisfy the requisite elements for the granting of such relief. He first argues, without citation to legal authority, that injunctive relief to prevent a transfer between prisons should not be subject to the traditional test for the granting of such relief. *Objections*, p. 4. The argument has neither logical nor intuitive appeal nor, as mentioned, any legal support.

Petitioner next contends that he has satisfied the four elements necessary to prevail in a preliminary injunction matter.<sup>1</sup> The Court remains unconvinced. His unsupported, speculative allegation that he will be transferred to another facility does not rise to the level of “irreparable injury.” *See Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988)(“A plaintiff must do more than merely allege imminent harm sufficient to establish standing; a

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<sup>1</sup> “A preliminary injunction is proper if there is a likelihood of irreparable injury to plaintiff; there are serious questions going to the merits; the balance of hardships tips sharply in favor of the plaintiff; and the injunction is in the public interest.” *M.R. v. Dreyfus*, 663 F.3d 1100, 1108 (9th Cir. 2011)(citing *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-32 (9th Cir. 2011)).

1 plaintiff must *demonstrate* immediate threatened injury as a prerequisite to preliminary  
2 injunctive relief.”) Petitioner has provided no proof that his transfer is imminent, and thus fails  
3 to establish a likelihood of irreparable injury. Nor does he have a constitutional right to  
4 incarceration in a particular prison (Meacham v. Fano, 427 U.S. 215, 224-25 (1976)), further  
5 invalidating his argument that the speculative transfer creates an irreparable harm.

6 Petitioner’s citation of Federal Rule of Appellate Procedure (FRAP) 23(a) avails him  
7 nothing, as the statute was not intended to cover his circumstances. FRAP 23 prohibits the  
8 custodial transfer of an inmate pending review of a decision in a habeas proceeding unless it is  
9 made by order of the court which made the decision. There has been no decision rendered in  
10 Petitioner’s habeas matter, therefore the statute is inapplicable. Petitioner argues that his  
11 “application for a writ of habeas corpus, under the plain language of FRAP 23(a), is a ‘pending  
12 review of a decision [to grant or deny] in a habeas corpus proceeding,’” but he cites no authority  
13 to support that interpretation and the Court simply disagrees with him that his current  
14 circumstances fall within the ambit of the rule.

15 Furthermore, the statute is intended to prevent removal of affected inmates from the  
16 territorial jurisdiction of the court in which the habeas petition is pending (*see Goodman v.*  
17 *Keohane*, 663 F.2d 1044, 1047 (11th Cir. 1981)) – a transfer to another Washington State prison  
18 would not contravene this statute even if it was applicable to Petitioner.

19 Petitioner fares no better in his argument that he is likely to prevail on the merits of his  
20 case or that there are “serious questions going to the merits” of his underlying claims. Petitioner  
21 wrongly assumes that, because Respondent has not yet responded substantively to the merits of  
22 his habeas petition, he can establish his likelihood of success by merely alleging that his claims  
23 are uncontested. Objections, p. 6. Petitioner has an affirmative burden to present the facts which  
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1 support his probability of prevailing on the merits of his underlying claims, and he has failed to  
2 do so. (His other argument on this element, relating to the merits of his claim that he is entitled to  
3 access to a law library in order to litigate his claims, goes to the merits of the preliminary  
4 injunction request itself and is irrelevant.)

5 **Conclusion**

6 The Court agrees with and adopts the Report and Recommendation filed herein. Even if  
7 Petitioner were entitled to injunctive relief in a pending habeas matter, he has failed to establish  
8 the requisite elements which would entitle him to that relief. His request for a preliminary  
9 injunction is DENIED.

10 The Court further rules that, since Petitioner clearly has the means to communicate with  
11 the Court commensurate with others of his status, his request for a phone number with which to  
12 communicate with the Court is similarly non-meritorious and will also be DENIED.

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14 The clerk is ordered to provide copies of this order to all counsel.

15 Dated this 7th day of January, 2013.

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18 Marsha J. Pechman  
19 United States District Judge  
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